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No. 82-173

In the Supreme Court of the United States

OCTOBER TERM, 1982

WASHINGTON STATE CHARTERBOAT ASSOCIATION,
PETITIONER

v.

HOH INDIAN TRIBE; QUINAULT INDIAN NATION;
QUILEUTE INDIAN TRIBE; MALCOLM BALDRIGE,
SECRETARY OF COMMERCE; and STATE OF WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in declining to disturb the denial of Petitioner Charterboat Association's application for intervention in litigation between treaty Indian Tribes, the State of Washington and the Secretary of Commerce over the management of Pacific Northwest salmon fisheries.

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-3) is not reported. The order of the district court (Pet. App. 4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1982. A petition for rehearing was denied on May 5, 1982 (Pet. App. 7-8). The petition for a writ of certiorari was filed on July 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case is a procedural sidetrack of the enduring controversy about the division of Pacific Northwest salmon between Indian treaty and non-treaty harvesters. This chapter of the litigation, which is itself lengthy, may be summarized as follows. On June 22, 1981, three Tribes with usual and accustomed fishing grounds on the north coast of Washington filed an action in which they asserted entitlement to approximately one-half of each and every run of salmon which would return to their fishing grounds were it not for prior interception. *Hoh* v. *Baldrige*, Civ. No. 81-742 (W.D. Wash. 1981). The Tribes challenged a management plan and regulations for 1981 ocean salmon fisheries promulgated by the Secretary of Commerce pursuant to the Fishery Conservation and Management Act (MFCMA), 16 U.S.C. 1801 *et seq.* They claimed that the ocean harvest contemplated in the Secretary's scheme would be so large as to deny them equal sharing on a river-by-river, run-by-run basis, if the State of Washington's announced spawning escapement requirements were to be enforced. The Tribes also attacked those spawning escapement requirements as unjustified by any legitimate conservation concern. Thus, the Tribes sought, alternatively, a reduction in the ocean catch level, or a lessening of the State's restrictions on their harvests in the terminal areas. As the beginning of the fishing season was imminent, the Secretary and the Tribes agreed to an expedited schedule calling for a hearing on the merits of the cause on August 3, 1981.

The State of Washington moved to intervene on July 5, 1981, and to consolidate the case with the ongoing proceedings in *United States* v. *Washington*,

Civ. No. 9213 (W.D. Wash.), which embraces a broad range of Indian fishing disputes.

Petitioner, an association of several hundred owners and operators of ocean charter vessels engaged in the recreational fishing industry, also filed a motion to intervene, as a defendant, on July 9, 1981. Petitioner's intervention papers emphasized that an adverse socioeconomic impact would flow from such a radical reduction in the ocean fishery. The application was premised upon both Rules 24(a)(2) and (b)(2), Fed. R. Civ. P.

On July 10, 1981, petitioner also filed a separate complaint challenging the Secretary's ocean regulations as unduly severe, especially as related to the recreational fishery. *Washington State Charterboat Association* v. *Baldrige*, Civ. No. 81-836 (W.D. Wash.). One of petitioner's several theories of the case was that the Tribes' treaty right embraced only one-half of the aggregate of all salmon, rather than one-half of each run to each river. In this formulation, a larger marine fishery could be accommodated.[1] Petitioner's prayer was for an order compelling the Secretary to rescind his regulations for the 1981 season and to promulgate new ones consistent with this formulation. On July 27, 1981, the Association moved to consolidate these two cases.

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[1] The problem stems from the fact that some salmon stocks in the mixed-stock ocean fishery are in a depressed condition and cannot withstand fishing pressure to the same degree as healthier stocks. Thus, in 1981, in order to ensure that sufficient numbers of the depressed Hoh River fall coho run would return to give the Tribe an equal harvest share, and also provide optimum spawning escapement, the ocean fishery would have had to be limited to a significantly lower level (several hundred thousand fish fewer) than would have been necessary to accommodate tribal rights to other, stronger runs.

The Secretary supported intervention by the State of Washington and by petitioner, with the caveat that there should be no delay and that matters requiring time-consuming discovery—such as the details of any scheme proposing the aggregation of fish of different species and origin [2]—would be deferred. The Secretary also agreed to consolidation of the *Charterboat Association* and *Hoh* cases.[3] The Tribes, however, opposed both motions. They contended that the Association had failed to file a responsive pleading with its intervention motion as required by Rule 24(c), and that the aggregation issue the Association sought to raise was res judicata under *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (Final Decision No. 1), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086; 459 F. Supp. 1020, aff'd, 573 F.2d 1123 (1978); substantially aff'd *sub nom. Washington* v. *Washington State Commercial Passenger Fishing Vessel Association (Fishing Vessel)*, 443 U.S. 658 (1979).

2. The district court initially denied both intervention motions in an order, dated July 23, 1981, which articulated no reasons. Washington and the Association filed an emergency motion for a stay of the proceedings in the court of appeals, which was denied

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[2] The precise nature of petitioner's allocation concept was not spelled out in its complaint or intervention papers. It was not clear, for example, whether petitioner's scheme would apportion the various species of salmon among the Tribes on the basis of numbers of fish, weight of catch, value of catch or some combination thereof. Discovery would have been necessary to determine how each Tribe would have fared.

[3] We opposed consolidation with the broader-scope *United States* v. *Washington*, *supra*, and the court denied the motion.

on July 31, 1981. On August 3, 1981, the district court, upon a reconsideration motion filed jointly by the State and the Secretary, granted Washington's intervention. The Association did not move for reconsideration.

After a hearing in which the State participated, the district court held that the Tribes' harvest share was to be calculated generally, although not inflexibly, on a run-by-run basis. The court refused to order the Secretary to reduce the ocean quotas. Instead, it ordered Washington to modify its spawning escapement criteria, which it determined to be unnecessary for the conservation of salmon. These rulings were memorialized in an order of September 22, 1981, in which the district court also instructed the parties to negotiate a long-term plan for the management of these fisheries. *Hoh* v. *Baldrige*, 522 F. Supp. 683 (W.D. Wash. 1981).

On February 12, 1982, the district court granted partial summary judgment to the Secretary in *Charterboat Association, supra*, on the ground that petitioner's submission was inconsistent with *United States* v. *Washington, Fishing Vessel* and *Hoh*. The district court indicated that the allocation rule was neither inflexible nor unalterable, but found nothing in petitioner's submission to justify a departure. Petitioner has taken an appeal from this ruling (No. 82-3113, 9th Cir.), which is pending.

On March 15, 1982, the court of appeals affirmed (Pet. App. 2-3) the denial of petitioner's intervention application, holding that the arguments which the Association sought to interject were foreclosed by *United States* v. *Washington* and *Fishing Vessel*. A petition for rehearing and suggestion for rehearing en banc was denied May 5, 1982 (Pet. App. 7-8).

On June 24, 1982, the district court, addressing one of the aspects of proposed long-term plans, ruled that shares of coastal coho salmon should be calculated by aggregating catch in a single river between spring, summer and fall runs. The court has announced its intention shortly to issue an order to this effect.

ARGUMENT

Whether its was error to deny intervention under the circumstances presented is fairly debatable. At all events, however, the case presents no issue of sufficient importance to warrant a grant of certiorari.

We believe that the district court would have followed the better path by allowing petitioner's intervention in this case, although it would have been appropriate to place certain conditions upon that participation in order to protect the rights of the original parties. The court might properly have permitted the Association to advance its arguments at the August 3, 1981, summary judgment session against the Tribes' alternative request for relief that the 1981 ocean fisheries be cut back further than called for in the Secretary's regulations.

It is not clear whether the Association correctly claimed intervention as of right, under Rule 24(a)(2). To be sure, an applicant for intervention need not have an ownership stake in a contested property or transaction; it is usually enough that his economic position will be substantially affected in a practical sense by the determination. See *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 134-136 (1967).[4] Here, the economic affairs of peti-

[4] The lower courts have for the most part construed this interest requirement broadly, as an inclusionary rather than exclusionary device. See, *e.g.*, *Natural Resources Defense*

tioner's members were plainly implicated.[5] It is also established that the prospective intervenor's burden of showing that his interests are not adequately represented by an existing party is not an onerous one. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). Nevertheless, here a persuasive argument can be made that the district court's grant of intervention to the State of Washington, whose perspective was quite similar, removed any need to admit the Association. At bottom, neither the Association nor any other non-Indian ocean user group has any entitlement to any specific share of the resource. The non-treaty right is a class right shared by all "citizens of the Territory," including those who fish in the rivers and other inland waters, under the authority of the State. *Fishing Vessel, supra*, 443 U.S. at 692 n.32;[6] *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 340-341 (1958); *Puget Sound Gillnetter's Association* v. *United States District Court*, 573 F.2d 1123, 1132 (9th Cir. 1978); *Washington Kelpers Association* v. *State*, 81 Wash. 2d 410, 415, 502 P.2d 1170 (1972).

Council v. *Costle*, 561 F.2d 904, 909-911 (D.C. Cir. 1977); *County of Fresno* v. *Andrus*, 622 F.2d 436, 438 (9th Cir. 1980); *United States* v. *Reserve Mining Co.*, 56 F.R.D. 408, 414-415 (D. Minn. 1972).

[5] This is true whether the decline in the charterboat industry (Pet. 7-8 n.7) is attributed to recent federal regulation recognizing Indian treaty rights, to a decline in the resource brought about by past overfishing, or both.

[6] In *Fishing Vessel, supra*, 443 U.S. at 692 n.32, the Court held that fishermen's associations could be bound by orders entered in proceedings in which they were absent but the State was a party. Indeed, we are informed that the petitioner here is the successor entity to the respondent there.

It may also be true that the court of appeals overstated somewhat the preclusive effect of *United States* v. *Washington* and *Fishing Vessel* on the questions which were to be litigated below. Neither spoke in any specific, unequivocal way to the narrow controversy at bar.[7] But, conceding arguendo that the application might more properly have been granted, petitioner's assertion (Pet. 39) that it has been aggrieved by denial of access to the courts must still be seen as hyperbole.

The Association's case on the merits was decided by the district court and is now before the court of appeals. The district court did not in 1981 or 1982 order reductions in the ocean fishery. Indeed, that court has recently held that the treaties do not compel the result which petitioner in its intervention papers feared: that the Secretary would be required to impose severe limits on non-Indian harvest of strong salmon stocks in order that the tribes be guaranteed a strictly equal share of the weaker runs.

In these circumstances, we submit there is no compelling reason that justifies review by this Court.

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[7] In *United States* v. *Washington*, 384 F. Supp. at 343, 344; 459 F. Supp. at 1070, the court enunciated a run-by-run precept wherever practical, but factored in the ocean catch (which was not at that point statistically determinable) only by means of a rough equitable adjustment, and acknowledged that pragmatism counselled a flexible approach to "the innumerable difficulties [which] will arise in the application" of the equal sharing principle.

CONCLUSION

The petition for a writ of certiorari should be denied.

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